Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

YOLANDA FRANK,

Petitioner,

v.

HARRIS COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit affirmed the district court's granting a judgment as a matter of law in favor of Harris County, despite a twelve member jury's findings that Harris County, through one of its Constables, sexually harassed Yolanda Frank, another employee, and then terminated her employment in violation of Title VII. The jury awarded Ms. Frank over $400,000.00 in back pay and compensatory damages. In affirming the district court, the Fifth Circuit relied primarily on the reason that, as an elected official, the sexual harasser-Constable was not an "employee" under Title VII and, thus, Harris County could not be held liable. Yet, the federal case law has consistently held that the employee exclusions under Title VII prevents those "excluded" from *invoking* the protections of Title VII - it is more an issue of standing. In fact, there is a direct conflict between the Fifth Circuit's holding in this case and at least one other Court of Appeals. Petitioner believes this may be a case of first impression for this Court.

Four questions are presented:

1. Does the "elected official" exception to the definition of "employee" under 42 U.S.C. § 2000e(f) apply when the elected official is the perpetrator of the Title VII violations?

2. Can an employer be held liable to an employee under Title VII if the perpetrator is not an "employee" under 42 U.S.C. § 2000e(f)?

3. Is the purpose of the definition of "employee" under 42 U.S.C. § 2000e(f) to determine if the aggrieved party has standing to assert a Title VII claim?

4. Is an employer liable under Title VII for the acts of its "agent," under 42 U.S.C. § 2000e(b), if that "agent" is not an "employee" under 42 U.S.C. § 2000e(f)?

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Fifth Circuit is reported in 2004 WL 2914035 (5th Cir. Decided December 15, 2004). *See* Appendix A.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fifth Circuit's opinion was rendered on December 15, 2004. (*See* Appendix A). Petitioner filed a Petition for Panel Rehearing on January 5, 2005 which was denied on January 19, 2005 (*See* Appendix C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 2000e.

Definitions

For the purposes of this subchapter —

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the

Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2101 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

. . .

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign county, such terms includes an individual who is a citizen of the United States.

. . .

Title 42 United States Code, Section 2000e-2.

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title 42 United States Code, Section 2000e-16a.

Short title; purpose; definition

(a) Short title

Sections 2000e-16a to 2000e-16c of this title may be cited as the "Government Employee Rights Act of 1991."

(b) Purpose

The purpose of sections 2000e-16a to 2000e-16c of this title is to provide procedures to protect the rights of certain government employees, with respect to

their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

. . .

Title 42 United States Code, Section 2000e-16c.

Coverage of previously exempt State employees

(a) Application

The rights, protections, and remedies provided pursuant to section 2000e-16b of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof —

(1) to be a member of the elected official's personal staff;

(2) to serve the elected official on the policymaking level; or

(3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

STATEMENT OF THE CASE

Petitioner Yolanda Frank asserts that former Constable A. B. Chambers ("Constable Chambers") subjected her to sexual harassment while she was employed as a deputy by Harris County, Texas, at Precinct 7 and filed suit under Title VII of the Civil Rights Act of 1964, claiming quid pro quo sexual harassment, and also under 42 U.S.C. § 1983 for deprivation of civil rights.

1. In 1995, Ms. Frank was a 32-year old, happily married mother of three, who graduated in the top 5 out of 60 people in University of Houston's law enforcement academy. In 1996, Harris County's Precinct 7 commissioned her as a non-paid reserve deputy, a trainee position to become a deputy. At that time, Constable Chambers had been Constable at that precinct for many years, and was employed at, and he received his compensation from, Harris County. As Constable of Precinct 7, Chambers was Ms. Frank's supervisor. The county has had, at all pertinent times over fifteen employees, and, through Constable Chambers, interviewed Ms. Frank for a deputy constable position and hired her. Her first paid position was as Absent Student Assistance Program ("ASAP") deputy constable. This program is funded by the Houston Independent School District ("HISD") for nine months during the school year but the deputy constables also work during the summer months at Precinct 7.[1]

Just after starting her paid position in ASAP, on or around December 23, 1996, through October of 1998, when she was fired in retaliation for rebuffing Constable Chambers' sexual advances, Ms. Frank was subjected to sexual harassment. She then suffered retaliation for her constant rejections of the harassment by being terminated from employment — all in violation of Title VII.

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1. Deputy constables in the ASAP division worked under contract for HISD funded program during the school year but were under different programs during the summer. Being a deputy constable is a continuous job much like an HISD teacher is considered full-time even though a teacher does not work during the continuous job much like an HISD teacher is considered full-time even though a teacher does not work during the summer. Only as a deputy constable was Ms. Frank qualified for certain work assigned by the Constable's office, all ASAP deputies continued to work during the entire year, Ms. Frank had worked in the summer of 1997 for Precinct 7, and expected to do so and did during the summer of 1998.

Although there were other instances, at trial Ms. Frank related at least six incidents of flagrant and increasing vile sexual harassments and/or sexual assaults that she rejected, at which time he commenced retaliating against her with the help of his fiefdom of cronies.

A. The Sexual Harassment.

Ms. Frank was hired as a deputy constable making $2,014.00 per month. The first incident of sexual harassment occurred on or around of her hire date when Constable Chambers pretextually shook Ms. Frank's hand to great her, then grabbed her by the waist and pulled her to a corner, gave her a kiss on the check, and told her his wife did not approve of him kissing the girls so Ms. Frank was to come into his office to kiss him.

Other incidents followed over the course of several months including Constable Chambers isolating Ms. Frank in his office, touching her breasts, forcefully kissing her and other sexually offensive conduct, all to her disapproval and disgust. He even asked her to join him at the Warwick Hotel in Houston where he had told her he had a room. Practically all of these incidents occurred in Constable Chambers' office.

B. The Retaliation.

In early January, 1998, Constable Chambers grabbed Ms. Frank's hand to his side and required that she go to his office. Ms. Frank had had enough of the constant stalking and harassment by Constable Chambers. She did not initially go to his office but later decided to take this opportunity to expressly tell Constable Chambers she was not interested in him sexually. She collected some pictures of her children, went to his office on or about January 11th, and proceeded to tell him she was not interested in the kindest way possible by showing him she was a family person and wanted to focus just on her job at work.

This express rejection by Ms. Frank of Constable Chambers' order for sexual favors, despite the integrity Ms. Frank built into it, was the catalyst for a barrage of retaliation inflicted upon Ms. Frank by Constable Chambers' directive that ultimately resulted in her unlawful termination on October 18, 1998.

From January 1998 through October 1998, Ms. Frank was tortured by the infantile behavior and "set-ups" adduced and condoned by Constable Chambers of his deputies toward Ms. Frank as a means to run her off because she had rejected Constable Chambers' desire for her to be sexually receptive and sexually active with him.

To Ms. Frank's horror, the retaliation took on different forms and the incidents of retaliation commenced almost immediately. One of the first retaliation incidents was on or around January 15, 1998 when Captain Spivey paged Ms. Frank hundreds of times. He responded when she returned his calls that she was crazy and he did not page her.

On April 15, 1998, Ms. Frank submitted a request for transfer or consideration for promotion that Harris County and Precinct 7 ignored. On September 23, 1998, she made a written request for a meeting because she was stressed at work. Although a meeting did take place, nothing was resolved. She looked for another job.

Ms. Frank sought out other employment but was not successful, so on September 2, 1998, Ms. Frank entered another formal ASAP employee contract with Harris County despite the retaliation because she needed the money to support her family. However, the retaliation continued. Constable Chambers' cohorts were not successful in getting Ms. Frank to voluntarily resign so they literally fabricated violations Ms. Frank allegedly

committed and generated write-ups to documents their files.[2] On October 14, 1998, Ms. Frank was terminated from her employment effective October 16, 1998.

Ms. Frank filed her Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") in February 1999 and thereafter received her "right to sue" letter. She filed her Original Complaint in the United States District Court for the Southern District of Texas on July 26, 1999 claiming

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2. These write-ups were so poorly thought out that Ms. Frank was not even at work on several of the dates the alleged infractions occurred. On August 22, 1998, Ms. Frank was written up for failing to report for duty but she was not assigned duty on Saturdays. Further, she would have shown up had she been told the function was scheduled and mandatory. On August 29, 1998, she was written up for failing to follow a direct order to release a juvenile to school at 4:00 p.m. when not only did she not work that day, it was a Saturday and there would be no children at school anyway. On September 25, 1998, she was written up for insubordination but the write-up does not setout what she did–because it was a completely fabricated "write-up" to support firing her. Finally, she was written up on October 9, 1998 for not picking up an attendance list after she was off-duty from Ryan Middle School, a location that could fax it, on an evening she had already told her supervisor's was the evening her daughter was being inducted into the National Honor Society and Constable Chambers' co-horts intentionally kept assigning her fabricated after-work orders to keep her at work to frustrate her attempt at being at her daughter's ceremony. Her daughter started to walk home because Mr. Frank arrived so late to pick her up due to a "riot" at Worthing High School–which "riot" did not exist as not one other unit but Ms. Frank was called to Worthing. Clearly the "incidents" of "insubordination" were pretexual to justify firing Ms. Frank when the real reason Constable Chambers wanted her gone was because she rebuffed him and did not want any of his people disrespecting his authority.

Title VII violations as well as violations of 42 U.S.C. § 1983.[3] The case was tried to a twelve member jury in April 2003, which resulted in a verdict in favor of Ms. Frank finding Title VII violations and awarding Ms. Frank damages totally over $400,000. The overwhelming evidence supported the jury's verdict.

Based upon post-trial motions, the district court entered a Final Judgment in favor of Respondent Harris County on September 18, 2003 on all of Ms. Frank's claims (Appendix B). On October 8, 2003, Ms. Frank filed her Notice of Appeal. The Fifth Circuit's decision was entered on December 15, 2004 affirming the district court (Appendix A). The Fifth Circuit focused primarily on the issue of Constable Chambers' status as an "employee" under Title VII and concluded that Harris County was not liable since Constable Chambers was not an "employee" under the Title VII definition. It also held that Harris County did not have sufficient knowledge of other Title VII violations at Precinct 7 to impart liability to Harris County for Chambers' conduct as a non-employee.

After obtaining an extension of time, the Petitioner timely filed her Petition for Panel Rehearing on January 5, 2005. On January 19, 2005, the Fifth Circuit denied the Petitioner for Panel Rehearing (Appendix C).

REASONS FOR GRANTING THE PETITION

Title VII was enacted to prevent discrimination in the workplace and to provide an avenue of recovery for those employees whom have been so discriminated against. Sexual harassment is a form of discrimination in violation of Title VII. Harris County meets the definition of "employer," and Ms. Frank

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3. Petitioner's § 1983 claim was dismissed prior to trial via summary judgment and is not addressed in this Petition for a Writ of Certiorari.

is clearly an "employee," under 42 U.S.C. § 2000e(b) and (f), respectively. Both the district court and the Fifth Circuit Court of Appeals held such. (*Yolanda Frank v. Harris County*, Slip op., p. 7). Yet, the Fifth Circuit went further and held that, because the individual sexual harasser — Harris County Constable A. B. Chambers — was elected to his position, he is not an "employee" under § 2000e(f) and, hence, Harris County cannot be held liable for his actions under the exemption language contained in 2000e(f).[4] The Fifth Circuit then held that, as an alleged non-employee, Harris County was not liable for Title VII violations.

Yet the overwhelming majority of other jurisdictions have applied this exclusion in the opposite manner — that the "elected official/personal staff" exclusion under 42 U.S.C. § 2000e(f) applies when the "elected official/personal staff" individual is the claimant under Title VII — not the perpetrator.[5] In addition,

4. The definition of "employee" under 42 U.S.C. § 2000e(f) of Title VII excludes persons elected to office or such persons chosen by that elected officer to be on his/her "personal staff." Clearly, Ms. Frank was not a "personal staff" individual, and neither Ms. Frank nor Harris County have ever taken such position. The evidence at trial unequivocally proved she was a *de facto* and *de jure* employee of Harris County, and not on Constable Chambers' personal staff. Thus, the "personal staff" exclusion as to Ms. Frank is not applicable to Ms. Frank, and is not an issue in this case. However, most cases based upon the employee exclusion issue involve the "personal staff" exemption and so the discussion as to that exclusion would pertain to the "elected official" one as well.

5. *See Starrett v. Wadley*, 876 F.2d 808, 821 (10th Cir. 1989); *Butler v. New York State Department of Law*, 211 F.3d 739, 744 (2d Cir. 2000); *Curl v. Reavis*, 740 F.2d 1323 (4th Cir. 1984); *Cromer v. Brown*, 88 F.3d 1315, 1323-4 (4th Cir. 1996); *Owens v. Rush*, 654 F.2d 1370, 1374 (10th Cir. 1981) [Title VII Plaintiff must show he is an "employee" under 42 U.S.C. § 2000e(f)]; *Beckman v. Darden*, 351 F. Supp. 2d 139, 144 (S.D.N.Y. 2004) ("Title VII excludes from the scope of its protections

(Cont'd)

at least one Court of Appeals has specifically held that a governmental employer is still liable under Title VII to one of its employees for the actions of one of its elected officials. The central purpose of 42 U.S.C. § 2000e(f) is one of standing — to determine if the aggrieved person is an "employee" under Title VII such that they can come under its protection. It is not meant to be used as a shield by the employer to escape liability, based upon the fact that its own employee-perpetrator happens to fall under the exclusionary language, when that very same perpetrator works for that employer and is paid for services rendered on its behalf. This conflict among these Courts of Appeal should be addressed by this Court.

In fact, in a similar case, the Fifth Circuit had just previously opined that the "elected official/personal staff" exception to the definition of an "employee" meant that if the Title VII *victim of harassment* is an elected official/personal staff member, that person may not *invoke* the protection of Title VII. In the case at bar, it is not the aggrieved party (Ms. Frank) who falls under the "elected official/personal staff" member, but the perpetrator — Constable Chambers — who was the "elected official." The Fifth Circuit held that, since Constable Chambers', as an elected official, does not fall within the definition of "employee" under § 2000e(f), then Harris County — which was Constable Chambers' employer in every other capacity — could not be held liable unto Ms. Frank's for his sexual harassment.[6] This

(Cont'd)
any elected official's appointee J. . ."); *Anderson v. City of Albuquerque*, 690 F.2d 796, 800-1, (10th Cir. 1982); *Gomez v. City of Eagle Pass*, 91 F. Supp. 2d 1000, 1005-6 (W.D. Tex. 2000).

6. Constable Chambers testified at trial he was employed by Harris County, was paid by it and that he answers to Harris County. In fact, in a previous case involving the very same allegations against Constable Chambers and Harris County by another female deputy constable, the county had conceded it was Constable Chambers' employer and was responsible for him in his official capacity.

holding runs contrary to its previous opinion, and to cases in other Courts of Appeals, on this very issue.[7] The Fifth Circuit's holding renders Title VII inapplicable to a victim of sexual harassment inflicted by an elected official, when both individuals have the same employer. There are cases from other jurisdictions that hold exactly the same as the Fifth Circuit did in a prior case it ruled upon in 2004. The Fifth Circuit should have followed the reasoning in that earlier case and in those in other Courts.

Ms. Frank's only recourse was against her employer — Harris County. She cannot sue Constable Chambers individually because, under Title VII, only the "employer" is liable. Thus, as found by the district court, any lawsuit Ms. Frank would have filed against Constable Chambers, individually, would be in his official capacity since Constable Chambers cannot be held individually liable.

This case has far reaching effects on those public employees who are subjected to Title VII violations, yet cannot seek protection under Title VII because of the skewed interpretation of the "elected official" exclusion invoked by the Fifth Circuit. To adopt the interpretation of this exclusion in the manner as the Fifth Circuit did in this case would prevent a broad class of Title VII victims to any protection from, and redress for, unlawful discrimination. There are untold numbers of public employers, with elected officials, throughout the United States. Literally thousands of local government employees could be subjected to constant Title VII violations by the elected official, without any avenue of recovery. In addition, the Fifth Circuit Court of Appeals' interpretation, and ruling based thereon, conflicts with the legislative history that the exclusion language be narrowly interpreted.

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7. The cases are cited in Footnote 5 and discussed, *infra*, in Sections I and II.

The Fifth Circuit also made a glaring error in overlooking that Constable Chambers is an agent of Harris County, and, as such, the county is liable pursuant to 42 U.S.C. § 2000e(b).

Review by this Court is therefore necessary to address this discrepancy in this "elected official" exclusion to the "employee" definition contained in Title VII, and the split among the Fifth Circuit and at least one other Circuit. The Fifth Circuit Court of Appeals' interpretation and ruling in this case is not in line with its own prior ruling, nor with the plethora of cases from other circuits and ignores the vicarious liability provisions in 42 U.S.C. § 2000e(b).

I. Review Is Warranted To Resolve A Conflict Between The Courts Of Appeal Concerning The Scope And Application Of The "Elected Official/Personal Staff" Exclusion To The Definition Of "Employee" Under 42 U.S.C. § 2000e(f).

A. The Fifth Circuit's Holding Conflicts with Other Circuits as to the Interpretation and Purpose of the "Employee" Exclusion Definition.

The Fifth Circuit's decision squarely conflicts with the holdings of other Courts which have held that a person excluded as an employee under the "elected official/personal staff" provision of § 2000e(f) cannot *invoke* the protections under Title VII, and that the perpetrator — elected official's employer is not exempt from liability under that same exclusion. (*See* Section II, *infra*, on the discussion of the "elected official" exclusion to a Title VII "employee"). The salient case on this issue is *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162 (11th Cir. 1993). (City held liable for Title VII violation for acts of its elected mayor in retaliating against city employee/plaintiff). (*See* cases cited in Footnote 5, *supra*).

In *Goldsmith*, the Eleventh Circuit Court of Appeals had before it a case directly on point with the instant case. In addressing the defendant - city's argument that the definition of "employee" under 42 U.S.C. § 2000e(f) excludes the elected mayor thus negating liability, the Court stated:

> The City suggests that Title VII's definition of "employee," *see* 42 U.S.C.A. § 2000e(f), governs the scope of agency liability under Title VII. Title VII defines "employee" to limit the class of workers entitled to protection against lawful employment practices, specifically excluding "any person elected to public office" from Title VII protection. *See, e.g., Starrett v. Wadley*, 876 F.2d 808, 820-22 (10th Cir. 1989); *Teneyuca v. Bexar County*, 767 F.2d 148, 150-53 (5th Cir. 1985). Because of Title VII's definition of "employee" exempts elected officials from Title VII protection, the City argues that Mayor Shell should also be exempt from Title VII liability. We reject this argument. Title VII's definition of "employer" incorporates liability for the act of "any agent" subject only to separate limitations not at issue in this case. *See* 42 U.S.C.A. § 2000e(b) (emphasis added).

Goldsmith v. City of Atmore, 1162, Footnote 10. The case makes clear the purpose of the employee exclusion language in § 2000e(f).

Yet, in the case at bar, the Fifth Circuit, to reach its decision, skewed the ramifications of the "elected official/personal staff" exclusion. Contrary to *Goldsmith*, it incorrectly held that, since Constable Chambers was elected to his position, he could not be an "employee" of Harris County and, thus, Harris County could not be liable to Ms. Frank. (*Frank v. Harris County*, Slip. Op. p. 7). This holding by the Fifth Circuit is totally contrary to,

and inconsistent with, other jurisdictions' interpretation of the employee exclusionary language of 42 U.S.C. § 2000e(f) and directly conflicts with Eleventh Circuit's holding in *Goldsmith v. City of Atmore*. This substantive discrepancy needs to be resolved.

B. The Legislative History of the "Personal Staff" Exclusionary Language of 42 U.S.C. § 2000e(f), Stating That the Exclusion Is to Be Narrowly Construed, Warrants That the "Elected Official" Exclusion Be Interpreted and Applied in Favor of Petitioner.

As set forth above, the vast majority of the cases addressing the employee exclusion of § 2000e(f) involve whether an individual claimant is on the personal staff of an elected official, and not an elected official themself. The legislative history of 42 U.S.C. § 2000e(f) shows that Congress intended the exclusion to be narrowly construed. *Anderson v. City of Albuquerque*, 690 F.2d 796 (10th Cir. 1982). The House and Senate conference committee report on this section provides, in pertinent part:

> It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees (sic) intent that this exemption shall be construed narrowly. Also, all employees subject to State or local civil service laws are not exempted. *1972 U.S. Code Cong. & Ad. News 2137, 2180. Anderson v. City of Albuquerque*, 696 F.2d at 800.

Courts have narrowly applied the factors to determine if a particular person was a personal staff member, and is, therefore, excluded from the protection of Title VII. Thus, this Court should, consistent with the legislative history, narrowly construe this provision and hold that it only applies to those elected officials/personal staff members who *file* a Title VII claim and, correspondingly does not insulate the employer merely because the perpetrator is elected to office. To apply this provision otherwise, as the Fifth Circuit did, would conflict with the legislative intent.

C. This Is a Case of First Impression Before this Court.

Based upon Ms. Frank's examination of the case law, there appears to be no prior pronouncement by this Court as to whether the "elected official/personal staff" employee exemption under 42 U.S.C. § 2000e(f) shields the employer from liability under Title VII in those instances wherein the person inflicting the discrimination is an elected official and is a *de facto* employee.

Additionally, as set forth in Section V below, this case is unique because it presents an additional theory of Harris County's liability despite the employee exclusionary language of 42 U.S.C. § 2000e(f) — that the definition of "employer" in 2000e(f), includes any ". . . agent of such person . . ." [i.e. the employer]. Harris County Constable A.B. Chambers is certainly an agent of that very county. Thus, this issue should be addressed by the Court as well.

II. Review Is Warranted In Order To Protect Employees Whom Work For A Governmental Entity And Are Subjected To Unlawful Discrimination By An Elected Official.

A. The "Elected Official" Exception to the Definition of "Employee" under 42 U.S.C. § 2000e(f) Does Not Apply When the Elected Official Is the *Perpetrator*.

Title VII was promulgated and enacted to protect employees in the workplace from discrimination. The jury found that Constable Chambers sexually harassed Ms. Frank and then terminated her in violation of Title VII.

Title VII employees are specifically defined, to-wit:

> The term **"employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff**, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of the State government, governmental agency or political subdivision. With respect to employment in a foreign country, such terms includes an individual who is a citizen of the United States.

42 U.S.C. § 2000e(f) (emphasis added). The Age Discrimination in Employment Act ("ADEA") has an identical exemption to § 2000e(f) of Title VII. Thus, the Courts look to those cases construing the parallel provision in § 630(f) of the ADEA in

determining the "elected official/personal staff" employee exclusion in Title VII cases. *Montgomery v. Brookshire*, 34 F.3d 291 (5th Cir. 1994), *E.E.O.C. v. Reno*, 758 F.2d 581 (11th Cir. 1985). Ms. Frank cannot sue Constable Chambers under Title VII — he is not her employer and only her employer is liable under Title VII. *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995), *Carver v. Sheriff of LaSalle County, Illinois*, 243 F.3d 379 (7th Cir. 2001). Harris County satisfies all elements to be an "employer" under 42 U.S.C. § 2000(b).

In its Opinion, the Fifth Circuit references the district court's holding that, since the harasser/perpetrator was Constable Chambers, whom is elected to office, he is thus not an "employee" under the exception language in § 2000e(f). The Fifth Circuit then reasoned Harris County cannot be his employer and thus no liability to be imposed on Harris County. (*Yolanda Frank v. Harris County*, Slip Op. - p. 7). But that inquiry is not necessary and, in any event, is incorrect. The Court failed to address this issue under the facts of this case, vis-a-vis whether the "elected official" exception insulates the employer's liability, when the perpetrator, *not the aggrieved party/claimant*, is an elected official.[8] The "elected official" employee exception bars an elected official from *seeking recovery under Title VII*, but does not shield the employer (Harris County) from liability when the sexual harasser/employee (Constable Chambers) is an elected official. *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162 (11th Cir. 1993). To hold otherwise would mean that an employee who is discriminated against by their boss, an elected official, has absolutely no rights under Title VII.

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8. Practically every case arising under Title VII wherein the "elected official/personal staff" issues occur involve whether the individual is deemed a personal staff member, and not an "elected official." However, the analogy and applicability of those cases are on point and germane to those involving an "elected official," since both exclusions are contained in the very same sentence in the § 2000e(f) exclusion.

In *Taplin v. Johnson*, 90 Fed. Appx. 736, 2004 WL 256547 (5th Cir., Feb. 11, 2004), the Fifth Circuit most recently addressed the issue of a "personal staff" individual bringing a Title VII claim. In its ruling, the Court found that the plaintiff therein, Etta Taplin, was a member of the perpetrator-sheriff's personal staff and stated:

> Sheriff Johnson and Ms. Johnson claim that Taplin was a member of Sheriff Johnson's "personal staff" and, therefore, that she may not bring suit against them under Title VII. *Title VII excludes from its protection* **"any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on** such officer's personal staff." 42 U.S.C. § 2000e(f) (2000) (defining "employer" for purposes of Title VII.) (emphasis added)

Taplin, p. 738 (emphasis added). It is this holding by the Fifth Circuit that, although contained in an unpublished opinion, sheds light on the intent and purpose of the "elected official" exception to the definition of employee — to prevent an elected official from invoking the rights and remedies under Title VII — not to insulate the employer from the wrongful conduct of the elected official. It is also consistent with holdings in other jurisdictions. (See Footnotes 5 and 6). In several cases prior to *Taplin v. Johnson*, the Fifth Circuit employed this same analysis — that the employee exclusion language is utilized in determining if the claimant therein was an "employee" under Title VII and, thus, could bring a Title VII claim: *Teneyuca v. Bexar County*, 767 F.2d 148, 150 (5th Cir. 1985) (Position of assistant district attorney, for which claimant applied, found to be excepted as an "employee" position under Title VII), *Gunaca v. State of Texas*, 65 F.3d 467, 470-1 (5th Cir. 1995) (Plaintiff investigator

was a member of the personal staff of elected district attorney and thus not "employee" for ADEA claim).

However, in the case at bar, this very same Court ignored those prior holdings to reach its conclusion that the exclusion constitutes a defense to the employer when the perpetrator is not an "employee" under that same subsection. To interpret and utilize this "employee" exception in this context would give the elected official unbridled and unfettered ability to violate Title VII with no recourse by the victim against his/her employer. It is Ms. Frank's position that the definition of "employee" under 42 U.S.C. § 2000e(f) is primarily (though not exclusively) for purposes of ascertaining if the claimant is an "employee" — to have standing — to assert a Title VII claim. This definition is not for the employer to assert as to its employee-perpetrator.[9] As the Court is aware, Ms. Frank could not sue Constable Chambers under Title VII because he is not her employer. Therefore, under Title VII, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the county is vicariously liable. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

Harris County is liable for Constable Chambers' sexual harassment. An examination of those Title VII cases in which the "elected official"/"personal staff" exceptions have arisen occur when the *victim/plaintiff* is the elected official/personal staff person, not when liability is imposed because the *perpetrator/sexual harasser* falls within one of those two exceptions, as in the case at bar. *See Montgomery v. Brookshire*, 34 F.3d 291 (5th Cir. 1994), *Teneyuca v. Bexar County*, 767 F.2d 198, 150 (5th Cir. 1985), *Gomez v. City of Eagle Pass*, 91

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9. *See Owens v. Rush*, 654 F.2d 1370, 1374 (10th Cir. 1981) [In order for the Plaintiff to prove Title VII violations, he must show that he was an "employee" under 42 U.S.C. § 2000e(f)].

F. Supp. 2d 1000, 1005-6 (W.D. Tex. 2000). Harris County cannot hide behind the cloak of Constable Chambers being an elected official; otherwise, persons such as Ms. Frank could be discriminated against *ad infinitum* by an elected official, with no legal recourse.

B. The Evidence Proved That Constable Chambers Was An Employee Of Harris County.

The evidence clearly showed that Constable Chambers was an employee of Harris County.

Harris County constables are employees under Title VII because they answer to the Harris County Commissioners' Court. Furthermore, at trial in response to questions by Ms. Frank's counsel, Constable Chambers himself testified that from 1996-98, he was employed by Harris County and was paid by it. He also said that in the administration of his duties as Constable, he answers to Harris County and the taxpayers. Employees are paid for their work by their employers. In a prior similar case, Harris County had conceded it was the employer and responsible for Constable Chambers' actions in his official capacity. *Moore v. Harris County, Texas*, No. H-98-1776, *5 n.4 (S.D. Tex. 2001) (quoting Memorandum and Order).

Texas exerts control over its constables by (1) determining if the constable has shown that it is "necessary to appoint a deputy in order to properly handle the business of the constable's office that originates in the constable's precinct," TEX. LOC. GOV'T CODE ANN. § 86.011(a); (2) determining and paying their salaries, TEX. LOC. GOV'T CODE ANN. §§ 152.001, 152.011; (3) withholding taxes and making payroll, *Moore v. Harris County*, No. H-98-1776 (S.D. Tex. 1998); determining the total number of deputy constables that can be appointed, TEX. LOC. GOV'T CODE ANN. §§ 151.002, 151.003; (5) specifically reviewing, approving, or denying each of the constable's

appointments, TEX. LOC. GOV'T CODE ANN. §§ 86.011(a), 151.003; and, (7) reviewing all necessary paperwork and setting a new salary if a deputy constable is promoted, TEX. LOC. GOV'T CODE ANN. §§ 152.001, 152.011. *Frank v. Harris County*, No. H-99-2383 7 (S.D. Tex. 2002) (Memorandum and Order for Defendant's Motion for Summary Judgment, and Memorandum Opinion of September 18, 2003). Constable Chambers' title is Constable of Harris County Precinct 7, and he is employed by Harris County. To hold otherwise would lead to the illogical conclusion that he did not have any employer during the many years he was Constable.

Of particular relevance to this issue is the Government Employee Rights Act ("GERA") contained in Title VII. It provides a procedural mechanism for those individuals, as defined in § 2000e-16(c), to bring a claim under Title VII against their governmental employer. Those persons who may invoke GERA are the personal staff/advisors who are normally deemed excluded as employees under § 2000e(f).[10] By enacting GERA as a means for those excluded as a personal staff member or constitutional advisor to an elected official, Congress clearly meant that the "elected official" exclusion under § 2000e(f) was only meant to *preclude* an elected officer from invoking the remedies of Title VII. Thus, GERA's purpose bolsters Ms. Frank's contention that § 2000e(f) pertains to standing of the aggrieved party. To hold otherwise would negate the very purpose of GERA.

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10. As discussed, in Section VI below, Ms. Frank is not a personal staff member of, nor a constitutional advisor to, Constable Chambers, and, therefore, cannot involve the procedures in GERA.

III. Review Is Necessary To Define The Scope Of The "Elected Official/Personal Staff" Exclusion To The Definition Of "Employee" Under 42 U.S.C. § 2000e(f).

Title VII provides a description of unlawful practices:

> Title 42 United States Code § 2000e-2. Unlawful employment practices
>
> (a) Employer practices
>
> It shall be unlawful employment practice for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

It is noteworthy that this section does not make a distinction as to an "elected official/personal staff" as the Title VII harasser — it speaks of *individuals* and *employees'* protection. In other words, reading § 2000e-2(a) with the definition of "employee" under § 2000e(f), leads to the conclusion that an "elected official/ personal staff" person cannot *invoke* the protection under Title VII. No where does it appear that the employer cannot be held liable for the actions of one of its elected officials when that official is the violator of Title VII.

IV. Review Is Warranted Because The Fifth Circuit Incorrectly Held That An Elected Official Cannot Be An Agent Of The Employer.

The Fifth Circuit held that, since Constable Chambers — the Title VII perpetrator — was not an employee under 42 U.S.C. § 2000e(f), then Harris County could not be liable. (*Frank v. Harris County*, Slip Op. pp. 7 - 8). This runs contrary to the law. At least one other Court of Appeals has held that local governments are liable under Title VII for the acts of its elected official, inflicted on one of its employees, despite the exclusionary language of 42 U.S.C. § 2000e(f), because the elected official is acting as an agent for the governmental entity. *Goldsmith v. City of Atmore*, 996 F.2d 1155 (11th Cir. 1993). *See Harvey v. Blake*, 913 F.2d 226, 227-8 (5th Cir. 1990); *Wilson v. Sysco Food Services of Dallas, Inc.*, 940 F. Supp. 1003 (N.D. Tex. 1996) [Supervisor of employee in Title VII claim is "agent" of employer under § 2000e(b)]. Since both the district court and Fifth Circuit correctly held that Ms. Frank was an employee of Harris County, and since the county is not immune from liability on the "elected official" employee issue, then it is strictly liable because of Constable Chambers' position at Harris County and because he was Ms. Frank's supervisor: *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

The Fifth Circuit's holding that neither *Burlington Industries* nor *Faragher* apply was based upon the incorrect premise of Constable Chambers' status as a non-employee. As set forth above, that result stemmed from the Fifth Circuit's erroneous application of 42 U.S.C. § 2000e(f).

V. Review Is Warranted Because, Despite The "Elected Official - Employee" Issue, Harris County Is Liable Since Constable Chambers Is Its "Agent" Under The Definition Of "Employer" In Title VII.

The Definitions Section of Title VII defines "person" and "employer." The first step is to ascertain if the employing entity is a "person" under § 2000e(a), which includes ". . . governments, governmental agencies, political subdivisions . . ." The next step is to determine if the "person" is an "employer" under § 2000e(b), having the requisite number of employees, etc. Of critical importance is that "person" is defined to include "any agent of such a person."

The Eleventh Circuit Court of Appeals has specifically held that a city is liable under Title VII to one of its employees for the Title VII violations of its elected mayor. *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162 (11th Cir. 1993). In that case, the Eleventh Circuit stated:

> The City also argues that it was entitled to judgment as a matter of law on Goldsmith's Title VII claim because it cannot be held liable for the acts of Mayor Shell. We find this argument to be without merit. Under Title VII, an "employer" may be found liable for a Title VII violation upon a judicial finding "that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint." *See* 42 U.S.C.A. § 2000e-5(g). Title VII defines a potentially liable "employer" as any "person engaged in an industry affecting commerce . . . *and any agent of such person.*" 42 U.S.C.A. § 2000e(b) (emphasis added). [FN8] Goldsmith predicates her Title VII claim against the City on the City's liability for the unlawful employment practices of Mayor Shell as its agent.

> FN8. In turn, Title VII describes a "person" as incorporating, "governments" and "political subdivisions." *See* 42 U.S.C.A. § 2000e(a).

Goldsmith, 996 F.2d at 1161-2. *Accord Harvey v. Blake*, 913 F.2d 226, 227-8 (5th Cir. 1990); *Wilson v. Sysco Food Services of Dallas, Inc.*, 940 F. Supp. 1003, 1008-9 (N.D. Tex. 1996). *Goldsmith* is exactly the same with the case at bar on this issue. This Court should find that Harris County is liable.

VI. Review Is Warranted Because The Government Employee Rights Act Of 1991 Does Not Apply In This Case To Give Petitioner A Means To Pursue Her Title VII Claims.

42 U.S.C. § 2000e-16a through 16c, of Title VII are referred to as the Government Employment Rights Act of 1991 ("GERA") and was enacted to 'close the gap' between some individuals excluded as "employee" in the definition of "employee" in § 2000e(f) of Title VII. It is a *procedural* mechanism, not a substantive law, in order for an applicable employee to pursue his/her Title VII grievance. Although it does not address this in its Opinion, the Fifth Circuit, during oral argument, inquired of both Ms. Frank and Harris County whether GERA would apply and, thus, have afforded Ms. Frank relief for her Title VII claims.

A close reading, however, shows that GERA would not apply to the circumstances in the case at bar. Section 2000e-16c sets forth the application of GERA:

> (a) Application
>
> The rights, protections, and remedies provided pursuant to § 2000e-16b of this title shall apply with respect to employment of any individual chosen or

> appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof–
>
> (1) to be a member of the elected official's personal staff;
>
> (2) to serve the elected official on the policymaking level; or
>
> (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

Ms. Frank does not fall within any of the three categories — she was not on Constable Chambers' personal staff, did not serve in a policymaking level, nor serve as an advisor on constitutional or legal powers of Harris County Constable's office.

Thus, Ms. Frank could not invoke GERA to her aid or benefit. *Decker v. University of Houston*, 970 F. Supp. 575 (S.D. Tex. 1997). Besides, GERA is a procedural statute and, if she could even invoke GERA, the results would have no doubt been the same — that she was subjected to Title VII violations and correspondingly awarded damages as found by the jury. Ms. Frank is therefore left without any recourse or remedy for the unlawful discrimination inflicted upon her.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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